Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Performance Measurements and Standards for Unbundled Network Elements and Interconnection	)	CC Docket No. 01-318
	)	
Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance	)	CC Docket No. 98-56
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
Petition of Association for Local Telecommunications Services for Declaratory Ruling	)	CC Docket Nos. 98-147, 96-98, 98-141

COMMENTS OF

MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

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SUMMARY OF POSITION

The existence of clear, meaningful performance measurements with benchmark standards accompanied by formidable, immediate, self-effectuating remedies to be applied in those instances in which an ILEC fails to meet the standards are essential to ensuring just, reasonable and nondiscriminatory access to the ILEC's network elements. McLeodUSA supports the adoption of national performance measurements and standards by the FCC to the extent that the FCC adopts minimum national standards that would serve to fill the gaps when a state commission has failed to act. Application of these standards should be limited to ILEC's with Section 251(c) obligations.

Any performance rules adopted by the FCC must function as a floor and not as a ceiling for the states. Any other result could create an impermissible barrier to entry for CLECs since state public utility commissions must have the ability to require ILECs to adhere to performance measurements with benchmark standards that will enable CLECs to comply with state mandated retail service quality requirements. Any complaint by ILECs about the burdens of complying with disparate state and federal performance requirements should be summarily dismissed by the FCC. ILECs impose that type of burden on CLECs on a routine basis.

Adoption of performance measurements and benchmarks must be associated with formidable, immediate, self-effectuating remedies paid by the ILEC providing discriminatory service. Remedies must be formidable enough to create an unmistakable economic signal for the ILEC that it is less costly to provide nondiscriminatory access to network elements than it is to thwart competition by providing discriminatory access to network elements. Finally, the FCC must require routine independent audits of the ILECs' compliance with the performance

measurements and benchmarks.

INTRODUCTION

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") submits these comments in response to the Federal Communications Commission's ("Commission" or "FCC") Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding. Under consideration is whether the FCC should adopt performance measurements and standards for evaluating performance in the provisioning, repair, and maintenance of facilities and services provided by incumbent local exchange carriers ("ILECs") to Competitive Local Exchange Carriers ("CLECs") when the CLEC provides local service to end user customers using network elements or wholesale services provided by the ILEC.

McLeodUSA provides integrated communications services, including local services, in 25 Midwest, Southwest, Northwest and Rocky Mountain states. The Company is a facilities-based telecommunications provider with, as of September 30, 2001, 393 ATM switches, 58 voice switches, 437 collocations, 520 DSLAMs, more than 31,000 route miles of fiber optic network and 10,700 employees. McLeodUSA serves residential and small and medium-sized business customers in over 400 markets in its 25-state local footprint.

The NPRM seeks comments on the need for and desirability of establishing federal performance measurements and standards for the provision, maintenance, and repair of unbundled network elements ("UNEs"), the nature of those measurements and standards, and the way in which such standards would be enforced. These standards would be applied to ILECs in connection with their provisioning of network elements that are used by CLECs to compete for end-user customers.

Based on a wealth of experience gained since it started providing competitive

local service in 1994, McLeodUSA agrees that clear, meaningful performance measurements with benchmark standards are essential to ensuring just, reasonable and nondiscriminatory access to the ILEC's network elements. Indeed, there can be no question that such performance measurements and benchmarks must exist to foster the development of the competitive environment that was the promise of the 1996 Act.[1] However, it has also been the experience of McLeodUSA that performance measurements and benchmarks are of limited value in promoting competition unless accompanied by formidable, immediate, self-effectuating remedies to be applied in those instances in which an ILEC fails to meet the standards.

Section 251(c) requires an ILEC to make UNEs available to CLECs. While the FCC has identified network elements that it determined ILECs were required to unbundle under the federal act, the Commission has heretofore encouraged states to develop the metrics to be used in determining whether the ILECs provisioning of UNEs was done in a manner that would enable CLECs to compete on a level playing field with the ILEC or its affiliates. As a result, many state public utility commissions have, at the urging of their staffs and CLECs such as McLeodUSA, recognized the need for and adopted comprehensive performance measurements and benchmarks to foster the growth of local competition in their respective states. Many state commissions have recognized that without performance measurements and benchmarks it is virtually impossible to

determine whether an ILEC is providing CLECs just, reasonable and nondiscriminatory access to network elements. Indeed, as the monopolist owner of the local network bottleneck, ILECs have an unmitigated ability and ample economic incentive to inhibit CLECs from effectively

[1] The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

competing through the use of the ILEC's network elements. Accordingly, an ILEC's failure to meet performance measurements and benchmarks must be backed up by equally meaningful economic consequences to the ILEC in the form of penalties and remedies paid to the CLEC in amounts that do not simply become a cost of doing business for the ILEC.

As discussed below, McLeodUSA supports the adoption of national performance measurements and standards by the FCC to the extent that the FCC adopts minimum national standards that would serve to fill the gaps when a state commission has failed to act. If strenuously and expeditiously enforced, national performance rules and accompanying self executing remedies adopted by the FCC should ensure that CLECs will receive a minimum level of services from an ILEC in every state, thereby eliminating one substantial barrier to competition in states that have failed to act. However, McLeodUSA strongly opposes any effort by ILECs or other parties to devise national performance measurements and standards as a subterfuge to foreclosing states from imposing additional or more stringent performance requirements on the ILECs.

I. PERFORMANCE MEASUREMENTS AND BENCHMARKS

The FCC has authority to adopt performance measurements and standards. Section 251(c) of the Telecommunications Act of 1996 imposes a duty on ILECs to provide interconnection, access to UNEs, and collocation at rates, terms and conditions that are just, reasonable, and nondiscriminatory.[2] Section 251(d) expressly authorizes the Commission to establish the regulations necessary to implement the requirements of Section 251.[3]

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[2] 47 U.S.C. §§ 251(c)(2), (c)(3), and (c)(6) (1996)

[3] 47 U.S.C. §§ 251(d) (1996)

The adoption of performance measurements and standards for interconnection, access to UNEs, and collocation is essential to assure that CLECs have timely, appropriate, and nondiscriminatory access to the critical services and facilities they need to compete in the market for local telecommunications services when state commissions have failed to act. Therefore, to the extent that a state public utility commission has not adopted standards, adoption of national performance measurements and standards by the FCC means that those states will not to start from scratch in developing standards and remedies. It is equally important that there would be a minimum set of performance standards that CLECs can rely on in devising and implementing a business strategy to compete with an ILEC in a new state.

Thus, McLeodUSA supports the concept of adoption of a minimum set of performance rules for wholesale services, as proposed by the Commission in the Notice. The goal of the 1996 Act to create the environment in which local competition could prosper to the benefit of consumers requires adoption of and strict enforcement of performance measurements and standards. Experience has shown time and again that absent such performance measurements and benchmarks tied to stringent remedy payments, ILECs do not have an inadequate incentive to provide timely, high-quality wholesale services to CLECs. If the FCC decides that national performance measurements are necessary, McLeodUSA believes that the proposed metrics being submitted by WorldCom, Allegiance and Covad are the minimum that would be needed to promote local competition.

It is instructive to note that the previously adopted federal performance plans adopted by the FCC in the context of ILEC merger applications have been woefully inadequate in terms of creating an environment that compels the ILEC to change their behavior toward providing just, reasonable and nondiscriminatory access to network elements. The lesson

learned is that ILECs can easily manipulate limited plans, especially when the penalties for nonperformance are so inconsequential to the ILEC in terms of economic impact. Indeed, the fact that the ILECs are repeatedly incurring fines and forfeitures for noncompliance confirms that ILECs view these merger related penalties as an acceptable cost of doing business in exchange for maintaining their monopoly hold on local markets.

II. IMPACT ON EXISTING OR NEW STATE PERFORMANCE MEASUREMENTS

McLeodUSA believes that any performance rules adopted by the Commission must function as a floor and not as a ceiling for the states. Any other result could create an impermissible barrier to entry for CLECs.

Either through explicit legislation or agency regulation, numerous states have adopted retail service quality standards that both ILECs and CLECs must satisfy. In order for CLECs to be able to meet these state mandated retail service quality standards, it is essential that ILECs be required through performance measurements and benchmarks to provide wholesale services (access to UNEs, access to wholesale services) at a level of performance that will permit a CLEC to meet state retail service quality standards. Given that there is a wide range of state retail service quality requirements, individual state public utility commissions must be able to adopt wholesale performance measurements and benchmarks for ILECs that will ensure that CLECs have a reasonable opportunity to satisfy the retail quality of service requirements. If a state fails to adopt adequate performance measurements and benchmarks for the ILEC as a wholesale provider, the state has created an impermissible barrier to entry in violation of Section 253.

The State of Illinois is a prime example of why adoption of national minimum performance standards must not interfere with performance measurements and benchmarks that

may be more comprehensive, stringent, or both that have been or will be adopted by state public utility commissions. The Illinois legislature passed a thorough rewrite of its state telecommunications laws in 2001, entitled House Bill 2900, signed into law as Public Act 92-0022 ("PA 92-0022"), effective June 30, 2001. Part of that comprehensive legislation mandates that a local exchange carrier ("LEC") automatically provide customer credits for (a) failing to install basic service within five (5) business days after receipt of an order, (b) failing to restore basic local service within 24 hours, and (c) failing to appear for a scheduled customer appointment.[4] The Illinois Commerce Commission ("ICC") has also been given explicit authority to assess penalties against LECs, including CLECs, for failing to meet a wide variety of retail service quality requirements.[5] The legislation also directs quarterly reporting of service quality by LECs to the ICC for publication on its website.[6] Other states are considering like legislation and other state public utility commissions are considering strengthening retail service quality requirements.

The adoption of national performance measurements by the FCC must not prevent the ICC from subjecting ILECs in Illinois to a comprehensive set of performance measurements and benchmarks to ensure that CLECs will have a reasonable opportunity to meet retail service requirements and obligations imposed by Illinois law. If the FCC preempts the performance measurements and benchmarks adopted by the ICC and subjects the ILEC in Illinois only to an abbreviated set of national performance measurements and benchmarks, this will eviscerate any

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4 220 ILCS 5/13-712(e); 83 IAC Part 732.30

5 220 ILCS 5/13-304

6 220 ILCS 5/13-712(f)

chance a CLEC in Illinois may have in meeting these state law obligations. Such a result would be a barrier to entry for CLECs in Illinois, and would contravene the intent of the 1996 Act to enable CLECs to compete on a level playing field with the ILEC.

The FCC has recognized that Section 251(d)(3) grants state public utility commissions authority to impose additional or more stringent requirements as long as the requirements imposed are consistent with the requirements of Section 251 and the Commission's rules and policies regarding local service competition.[7] There is established precedent for allowing the states to go beyond FCC requirements in this manner in other nationwide rules that concern ILEC provisioning of wholesale services. For example, the FCC has acknowledged that states may establish additional unbundling obligations as long as these state mandated unbundling obligations meet the requirements of Section 251 and the policies established by the Commission regarding network unbundling.[8]

Performance measurements and benchmarks for UNEs are very much like retail service quality standards, the establishment of which has been within the province of state public utility commissions. The FCC recognized in its Notice that the states have considerable expertise with performance measurements and standards.[9] The FCC must refrain from usurping the role state public utility commissions in this critical area.

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[7] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, 15 FCC Rcd 3696, at 3750-3752, 3754-3762 (1999) at ¶ 154.

[8] *UNE Remand Order* at ¶ 3767.

[9] Notice at ¶¶ 15, 28.

III. THERE IS NO UNDUE BURDEN PLACED ON ILECS TO COMPLY WITH FEDERAL AND STATE PERFORMANCE RULES

Any complaint by ILECs about the burdens of complying with disparate state and federal performance requirements should be summarily dismissed by the FCC. If anyone has a complaint in this regard it is CLECs, not the ILECs. For example, SBC routinely refuses to agree to identical terms and conditions in interconnection agreements from one state to the next unless a state commission has expressly ordered the SBC operating subsidiary to agree to the identical requirement in that other state. Changing the operating environment between states imposes additional costs on both the CLEC and ILEC since each organization has to modify practices and processes between the companies to operate under the different terms of the interconnection agreements. However, SBC's insistence on subjecting a CLEC to differing operating environments from state to state benefits SBC since its practice serves to limit its obligations as a wholesale provider from one state to the next. Thus, when it serves the ILECs' interests, ILECs themselves impose disparate terms and conditions on CLECs. Now that the shoe is on the other foot and CLECs will benefit under such a scheme, the ILECs should not be heard to complain.

Indeed, ILECs currently comply with state and federal requirements in other contexts, most notably collocation provisioning intervals and network unbundling requirements. Any burdens imposed on the ILECs from having to conform to different performance measurements and standards from multiple jurisdictions are outweighed by the attendant benefits.

IV. NATIONAL PERFORMANCE RULES SHOULD APPLY ONLY TO LECS SUBJECT TO SECTION 251(C) OBLIGATIONS

The purpose of adopting national performance measurements and benchmarks is to ensure that competitors have just, reasonable and nondiscriminatory access to network elements pursuant to Section 251(c). Thus, it makes sense to limit application of any standards adopted by the FCC to ILECs with Section 251(c) obligations. Under no circumstances should the Commission require CLECs to comply with the rules. The purpose of performance measurements and standards combined with meaningful remedies is to create the necessary incentive for ILEC in control of the network elements required by CLECs to compete in the market to provide wholesale services to its competitors in a just, reasonable, and nondiscriminatory manner.

V. REMEDIES

Adoption of performance measurements and benchmarks are of little value to promoting local competition and CLECs unless associated with formidable, immediate, self-effectuating remedies paid by the ILEC providing discriminatory service. Remedies must be formidable enough to create an unmistakable economic signal for the ILEC that it is less costly to provide nondiscriminatory access to network elements than it is to thwart competition by providing discriminatory access to network elements. Any error must be on the side of remedies being too large rather than too small. If ILECs perceive that the cost of noncompliance is only marginally higher or equal to the cost of compliance, then ILECs will choose noncompliance. The past five years have shown in no uncertain terms that ILECs have the financial resources to outlast CLECs even when paying a variety of penalties and fines imposed by various commissions, including the FCC, and the marginal remedy plan payments under existing remedy

plans.

Therefore, the FCC performance metrics must include enforcement mechanisms designed to thoroughly discourage noncompliant ILEC behavior and compensate CLECs for damages that result from failure to comply with the metrics. The FCC's willingness to strongly enforce its national standards through formidable penalty assessments is especially important since certain state public utility commissions may not have the requisite state statutory authority to require ILECs to make remedy payments in excess of what the ILEC voluntary offers under the ILEC's proposed remedy plan. ILECs have successfully challenged state public utility commission rulings that have adopted remedy plans that result in remedy payments in excess of the amounts that the ILEC has "voluntarily" agreed to provide under their proposed plan on the grounds that the state agency lacked statutory authority to impose penalties. Thus, certain ILECs have been able to avoid meaningful penalty payments at levels that the state public utility commission determined was necessary to properly incent the ILEC to provide nondiscriminatory access to UNEs. The FCC should be prepared to step in and support a state public utility commission's determination on remedy plans to ensure that an ILEC cannot circumvent the state public utility commission determinations.

Although remedies paid by ILECs to CLECs for discriminatory service will never fully compensate CLECs for the direct and consequential damages inflicted by poor wholesale performance, if the remedies are formidable enough to make ILECs comply with its legal obligations, CLECs should be able to fairly compete in the marketplace for customers.

VI. AUDITS

The FCC must require routine independent audits of the ILECs' compliance with the performance measurements and benchmarks. Without such audits, the FCC will have no basis on which to determine whether the data generated and reported by the ILECs is reliable. Indeed, the FCC's forfeiture proceedings against SBC Communications, Inc. ("SBC") for failure to comply with certain merger conditions in the SBC/Ameritech merger order aptly demonstrate the need for independent audits.[10] There are Exceptions outstanding in the SBC-Ameritech region in which KPMG and other parties have identified discrepancies in performance measurement data reported by SBC-Ameritech. There should be no question that independent audits are a critical part of any performance measurement rules adopted by the FCC.

[10] *See, e.g., SBC Communications, Notice of Apparent Liability*, File No. EB-00-IH-0432, DA 00-2858, rel. Dec. 20, 2000.

CONCLUSION

For the foregoing reasons, McLeodUSA urges the Commission to adopt a minimum set of performance measurements and standards that, in the absence of adoption of performance measurements and standards by a state public utility commission, would govern the ILEC's provision of wholesale services as expeditiously as possible and in accordance with the principles set forth above.

Respectfully submitted,

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